No. 29

In the Supreme Court of the United States

OCTOBER TERM, 1957

THE UNITED STATES, PETITIONER

v.

CENTRAL EUREKA MINING COMPANY (A CORPORATION), ALASKA-PACIFIC CONSOLIDATED MINING COMPANY, IDAHO MARYLAND MINES CORPORATION, HOMESTAKE MINING COMPANY, BALD MOUNTAIN MINING COMPANY, ERMONT MINES, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

REPLY BRIEF FOR THE UNITED STATES

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I

THE GOVERNMENT HAS NOT CHANGED ITS POSITION

A reading of the Government's brief will show respondents' numerous assertions with respect to the factual and record inadequacies allegedly contained in the Government's brief,[1] and the faults respondents

[1] The record reference, "1777", which appears at p. 61 of the Government's brief includes a typographical error. (See Resps. Br., App. A., p. 55). The quoted phrase, preceding the record reference, is taken from Plaintiff's Exhibit 1 and appears at p. 1177 of the printed record.

find with the Government's organization of its brief (Resps. Br., pp. 9–10), to be either unfounded or trivial. We shall not, however, let pass without more detailed comment respondents' charge that the Government in its brief has now reversed "the position which it took in the petition for certiorari" (Br., p. 35) and that its present contentions are inconsistent with and not comprised within the question presented in the petition for a writ of certiorari (Br., pp. 17, 58, 60–62).

The Government's position in these and other L–208 cases has from the very outset been that the limitations imposed upon the gold mining industry in World War II, pursuant to the wartime allocation powers of the Federal Government, did not involve a taking of private property within the meaning of the just compensation clause of the Fifth Amendment. We think the Government's position on this, the principal point in these cases, is accurately and consistently stated in the petition for a writ of certiorari, and in the Government's brief on the merits. There is, moreover, no substantial variation in the "Question Presented" as stated in our petition and brief. Respondents' fault-finding in this respect (Br., pp. 60–62) is captious.

It is true that the Government's brief puts before this Court Priorities Regulation 13 as well as the two amendments to L–208 which apparently were not considered by the Court of Claims and were not referred to in the petition for a writ of certiorari. If, however, this additional regulatory action by the WPB,

taken from the Federal Register and of equal dignity to the original L–208, is material in determining the legal consequences of L–208, there can be no serious question of the propriety or of our responsibility of bringing it to this Court's attention. While our position on the legal merits of respondents' claims would be the same without Priorities Regulation No. 13 and the amendments to L–208, we do not think that, because this material cuts the ground from under the apparent rationale of the Court of Claims' decision in these cases, our partial reliance on that material warrants respondents' charge (Resps. Br., p. 35) that we have reversed the position taken in the petition for a writ of certiorari or (Resps. Br., p. 17) that we are endeavoring to put before this Court questions and argument inconsistent with and not fairly comprised within the question presented in the petition for a writ of certiorari.

Two other facets of respondents' brief warrant reply.

II

LIMITATION ORDER L–208 WAS NOT AN EXERCISE OF CONDEMNATION AUTHORITY UNDER TITLE II OF THE SECOND WAR POWERS ACT

In our main brief (p. 69), we pointed out that in issuing L–208 the WPB acted under the allocation authority coming to it, by delegation from the President, from Title III of the Second War Powers Act. In addition, we demonstrated that WPB had no authority to "take" respondents' right to mine gold. Respondents repeatedly state (Br., pp. 3, 68, 69, 70,

78, 83, 116) that the effect of L–208 was the same as if the Government had taken physical possession of the mines and closed them down until the Order was revoked. The same argument could be made, of course, wherever regulatory action by the state or federal government restricts or limits the profitable use of private property. Cf. *Mugler* v. *Kansas,* 123 U. S. 623; *Hamilton* v. *Kentucky Distilleries Co.,* 251 U. S. 146; *Jacob Ruppert* v. *Caffey,* 251 U. S. 264.

Respondents now argue (Br., pp. 115–122), however, that specific statutory authority for the "taking" allegedly effected by L–208 is to be found in Title II of the Second War Powers Act, 56 Stat. 177. Title II gave to the Secretaries of War and Navy, or any other officer, board, commission or governmental corporation authorized by the President, the authority to "cause proceedings to be instituted in any court having jurisdiction of such proceedings, to acquire by condemnation, any real property, temporary use thereof, or other interest therein * * *, that shall be deemed necessary, for military, naval, or other war purposes * * *."

The WPB, by L–208, did not, and did not purport to, acquire respondents' realty or personalty, or any interest therein for a war purpose or otherwise. In addition, the WPB was never authorized by the President to institute the condemnation proceedings prescribed in Title II. It is, therefore, a fiction for respondents now to suggest that L–208, in terms and effect an order allocating material and equipment, was an exercise of the condemnation authority under Title II of the Second War Powers Act.

III

THE ACT OF JULY 14, 1952, IS NOT AN ADMISSION OF GOVERNMENTAL LIABILITY

As an alternative argument in support of the judgment of the Court of Claims, respondents urge in this Court, as they did in the Court of Claims, that the Act of July 14, 1952, 66 Stat. 605, is a mandate from Congress to the Court of Claims to award compensation wherever it is proved that losses were incurred as a result of L–208. We pointed out in our main brief (p. 44, n. 29) that this contention is refuted by the language of the Act as well as by its legislative history. In the light of respondents' extended argument on this point (Resps. Br., pp. 130–146), further elaboration is appropriate.

The 1952 Act is as far as Congress has been willing to go toward granting legislative relief to the mines affected by L–208. The Act is the third of three legislative measures sponsored by Senator McCarran which, in varying degree, were designed to afford relief to mines affected by L–208. S. 27, "a bill to provide for suspending the enforcement of certain obligations against the operators of gold and silver mines" (89 Cong. Rec. 34), introduced in the 78th Congress, was reported by the Senate Judiciary Committee (S. Rep. 271, 78th Cong., 1st Sess., 89 Cong. Rec. 5187), and though, as amended, it passed the Senate (89 Cong. Rec. 6094–6095), it died in the House Committee on Mines and Mining (89 Cong. Rec. 6180). S. 45, a bill designed to compensate extra-judicially mining concerns affected by L–208, introduced by Senator McCarran (95 Cong. Rec. 39)

and favorably reported by the Senate Judiciary Committee (S. Rep. 79, 81st Cong., 1st Sess.), met a similar fate but as the result of action on the floor of the Senate (95 Cong. Rec. 2764, 13297, 14722; 96 Cong. Rec. 1278, 14691, 16592). S. 3195, which became the Act of July 14, 1952, was introduced by Senator McCarran on May 19, 1952 (98 Cong. Rec. 5394), following the Court of Claims' decision in *Idaho Maryland Mines Corporation* v. *United States*, 122 C. Cls. 670, on May 6, 1952, which held that Idaho Maryland was "entitled to a trial on the merits to prove its claim that the action of the War Production Board was far more than a regulation and [that L–208] amounted to a taking of plaintiff's right to mine and sell gold" (122 C. Cls. 670, 689). By the date of the *Idaho Maryland* decision, the six-year limitation period (28 U. S. C. 2501) on L–208 claims had long since expired and thus posed a jurisdictional bar to most claims based upon L–208. As the pertinent congressional reports confirm, it was this impediment that S. 3195 was designed to remove.

The purpose of S. 3195, as stated in the Senate Report submitted by Senator McCarran (S. Rept. No. 1605, 82d Cong., 2d Sess.), was as follows:

> The purpose of the proposed legislation is to authorize the United States Court of Claims to have jurisdiction to hear, determine, and render judgment, *notwithstanding any statute of limitations, laches, or lapse of time* on the claim of any owner or operator of a gold mine or gold placer operation for losses incurred allegedly because of the closing or curtailment or prevention of operations of such mine or placer operation as a result of the restrictions

> imposed by War Production Board Limitation Order L–208 during the effective life thereof. [Emphasis added.]

Identical language appears in the House report (H. Rep. 2220, 82d Cong., 2d Sess., p. 1) and both reports reflect extended reference to the holding in *Idaho Maryland, supra*. Referring to the *Idaho Maryland* decision, the Senate and House Reports, *supra*, state (p. 2):[2] . . .

> At the present time many other claimants who have as good a right for an adjudication of their claims as does the Idaho Maryland Mines Corp. may not prosecute such claims due to the running of the statute of limitations. Many of the claimants after the ruling in the Oro Fina case undoubtedly felt that to file in the Court of Claims would be useless and, therefore, allowed the statute to run against them. It must be noted that the great majority of the mine operators affected by the order were the small operators who were mining in many out-of-way places and did not have the facilities to employ legal staffs to keep them informed of

[2] In support of their argument that the 1952 jurisdictional act was intended as a Congressional admission of liability, respondents rely (Br., p. 144) upon a quotation from a House subcommittee report on H. R. 4393, reproduced *in extenso* in the Senate and House Reports on S. 3195 (pp. 3–7). But respondents' reliance upon language from a subcommittee report on H. R. 4393 is misplaced and, we believe, misleading. H. R. 4393 was introduced in the 79th Congress by Representative Engle (91 Cong. Rec. 9726). Unlike S. 3195, H. R. 4393 was designed to compensate administratively mine operators affected by L–208. Significantly, H. R. 4393 was never reported by the Committee on War Claims to which it was referred (91 Cong. Rec. 9726, Index, p. 913). Language from the subcommittee report on H. R. 4393 hardly affords a reliable guide as to the Congressional purpose underlying S. 3195.

> their possible rights. They accepted the order under duress and then had no facilities with which to overcome the great prestige of Government.
>
> * * * * * *
>
> The Idaho Maryland Mines Corp. decision is ample evidence of the fact that the least that can be done is to allow those persons affected by Order L–208 their day in court for such recompense as may seem justified * * * [p. 7].

S. 3195 passed both the Senate (98 Cong. Rec. 6322) and House (98 Cong. Rec. 8931) without floor debate, an unlikely event if Congress was admitting to a liability running well into the millions of dollars. But we think it clear that the 1952 Act is susceptible of no such meaning. Rather, in accordance with the canon that acts of this character are to be strictly construed,[3] the jurisdictional act should be accepted for what it was obviously intended to be—a waiver of the jurisdictional bar of the statute of limitations which would otherwise stand in the way of a determination on the merits of most of the 150 claims, based upon L–208 which have now been filed with the Court of Claims.[4]

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[3] *United States* v. *Goltra*, 312 U. S. 203, 210, and cases cited, n. 20.

[4] If the Act of July 14, 1952, is, as respondents argue, a Congressional mandate to the Court of Claims to award compensation wherever it is proved that losses were incurred as a result of L–208, there would have been, of course, no necessity for the Court of Claims to decide, as it did, the constitutional question in these cases. In these circumstances, we feel fully justified in saying (Br. p. 44, n. 29) that respondents "unsuccessfully urged" this argument in the Court of Claims. The majority of the Court of Claims considered respondents' contentions "unnecessary to discuss" and the argument must necessarily have been rejected by the two dissenting judges.

CONCLUSION

For these reasons, together with those set forth in our main brief, we respectfully submit that the judgment of the Court of Claims should be reversed with directions to dismiss respondents' petitions in that court.

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